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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 BRIAN J. DEBARR,) 3:12-cv-00039-LRH-WGC
9 Plaintiff,) **ORDER**
10 vs.)
11 TARA CARPENTER, et al.,)
12 Defendants.)
13 _____)

14 Before the court is Defendants' Motion for Leave to File Certain Confidential and Highly
15 Confidential Documents Referenced in the Renewed Motion for Summary Judgment Based on Qualified
16 Immunity Under Seal. (Electronic Case Filing (ECF) No. 108.) Plaintiff filed a response (ECF No. 111),
17 and Defendants filed a reply (ECF No. 113).
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I. BACKGROUND

19 Defendants seek to file certain exhibits which support their renewed motion for summary
20 judgment under seal; specifically, Exhibits H, I, J, K, L and N. (ECF No. 108 at 2.) They identify the
21 exhibits as follows:
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23 Exhibit H: Transcript of DeBarr Disciplinary Hearing
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25 Exhibit I: Transcript of Gadsden Disciplinary Hearing
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27 Exhibit J: Transcript of Peterson Disciplinary Hearing
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Exhibit K: DeBarr Disciplinary Hearing Audio Recording
Exhibit L: Gadsden and Peterson Audio Recordings; and
Exhibit N: "Confidential" Deposition of Widmar
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1 Exhibits H, I, J and N can be found in the record at ECF Nos. 125-1, 125-2, 125-3 and 125-6,
 2 respectively. Exhibits K and L, which are audio recordings, were manually filed by Defendants.

3 Defendants argue that the documents fall under the Amended Stipulated Protective Order
 4 (ECF No. 100), and contain sensitive information concerning inmates' disciplinary hearings and discuss
 5 the hearings of Plaintiffs (Plaintiff Brian J. DeBarr in this action, and Plaintiffs Chioke Gadsden and
 6 Nathan Peterson in *Gadsden v. Carpenter.*, Case No. 3:12-cv-00098-MMD-VPC). In the case of
 7 Widmar's deposition, they argue that it discusses disciplinary proceedings of third party inmates.
 8 (ECF No. 108 at 1-2, 4.) Defendants cite Administrative Regulation (AR) 569 which states that
 9 “[i]nmate information that is not specifically approved for disclosure within an NDOC Administrative
 10 Regulation is considered confidential for purposes of disclosure, does not constitute a matter of public
 11 record, and is not to be communicated and/or released to the general public or to the news media.” (*Id.*
 12 at 3.) They note that courts have granted requests to file case notes under seal citing legitimate
 13 penological interests in keeping the confidential information from the public. (*Id.*, citing *Ortiz v. Cox*,
 14 2010 WL 3025199 (D. Nev. July 29, 2010)

15 In his response, Plaintiff cites that he, as well as Gadsden and Peterson in their own actions, have
 16 challenged the propriety of their disciplinary hearings and specifically put them at issue; thus, they have
 17 waived any privacy right as to what took place during those hearings, and submit declarations from each
 18 of the plaintiffs to that effect. (ECF No. 111 at 2, ECF No. 111-1 (DeBarr Decl.), ECF No. 111-2
 19 (Gadsden Decl.), ECF No. 111-3 (Peterson Decl.)) Therefore, Plaintiff contends no compelling reasons
 20 exist for sealing these documents. Insofar as Exhibit N (Widmar's deposition) is concerned, Widmar
 21 apparently discusses the disciplinary hearings of other inmates around the same time and concerning the
 22 same issue as Plaintiff's (submitting grievances concerning the pagan grounds). Plaintiff argues that
 23 Defendants' concerns are adequately addressed by redacting the names and other identifying information
 24 from the public filings. (*Id.* at 3.)

25 In their reply, Defendants argue that regardless of the waiver by these plaintiffs, there is a
 26 question as to whether the recordings and transcripts are public records since there was no requirement
 27 that the disciplinary hearings be recorded. (ECF No. 113 at 2.) In any event, Defendants assert that the
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1 court should balance the concerns of Defendants regarding what they describe as public access to highly
 2 sensitive, confidential disciplinary proceedings which “could have serious safety and security
 3 implications” in favor of sealing the documents. (*Id.* at 2.) Finally, Defendants disagree with the
 4 approach of redaction for Widmar’s deposition transcript. (*Id.* at 3.) They point out that Plaintiff’s
 5 counsel agreed to ask the questions that appear in this portion of the transcript outside the presence of
 6 the parties due to the confidential nature of Widmar’s responses.

7 **II. LEGAL STANDARD**

8 “Historically, courts have recognized a general right to inspect and copy public records and
 9 documents, including judicial records and documents.” *See Kamakana v. City and County of Honolulu*,
 10 447 F.3d 1172, 1178 (9th Cir. 2006) (internal quotation marks and citation omitted). “Throughout our
 11 history, the open courtroom has been a fundamental feature of the American judicial system. Basic
 12 principles have emerged to guide judicial discretion respecting public access to judicial proceedings.
 13 These principles apply as well to the determination of whether to permit access to information contained
 14 in court documents because court records often provide important, sometimes the only, bases or
 15 explanations for a court’s decision.” *Oliner v. Kontrabecki*, 745 F.3d 1024, 1025 (9th Cir. Mar. 20,
 16 2014) (quoting *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983)).

17 Documents that have been traditionally kept secret, including grand jury transcripts and warrant
 18 materials in a pre-indictment investigation, come within an exception to the general right of public
 19 access. *See Kamakana*, 447 F.3d at 1178. Otherwise, “**a strong presumption in favor of access is the**
 20 **starting point.**” *Id.* (internal quotation marks and citation omitted) (emphasis added). “The presumption
 21 of access is ‘based on the need for federal courts, although independent—indeed, particularly because
 22 they are independent—to have a measure of accountability and for the public to have confidence in the
 23 administration of justice.’” *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th
 24 Cir. 2016), *cert. denied*, 137 S.Ct. 38 (October 3, 2016) (quoting *United States v. Amodeo (Amodeo II)*,
 25 71 F.3d 1044, 1048 (2nd Cir. 1995); *Valley Broad. Co. v. U.S. Dist. Court-D. Nev.*, 798 F.2d 1289, 1294
 26 (9th Cir. 1986)).

1 There are two possible standards a party must address when it seeks to file a document under
2 seal: the compelling reasons standard or the good cause standard. *See Center for Auto Safety*, 809 F.3d
3 at 1096-97. Under the compelling reasons standard, “a court may seal records only when it finds ‘a
4 compelling reason and articulate[s] the factual basis for its ruling, without relying on hypothesis or
5 conjecture.’” *Id.* (quoting *Kamakana*, 447 F.3d at 1179). “The court must then ‘conscientiously balance[]
6 the competing interests of the public and the party who seeks to keep certain judicial records secret.’” *Id.*
7 “What constitutes a ‘compelling reason’ is ‘best left to the sound discretion of the trial court.’” *Id.*
8 (quoting *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 599 (1978)). “Examples include when a court
9 record might be used to ‘gratify private spite or promote public scandal,’ to circulate ‘libelous’
10 statements, or ‘as sources of business information that might harm a litigant’s competitive standing.’”
11 *Id.* (citing *Nixon*, 435 U.S. at 598-99).

12 *Center for Auto Safety* described the good cause standard, on the other hand, as the exception to
13 public access that had been applied to “sealed materials attached to a discovery motion unrelated to the
14 merits of a case.” *Id.* (citing *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213-
15 14 (9th Cir. 2002)). “The ‘good cause’ language comes from Rule 26(c)(1), which governs the issuance
16 of protective orders in the discovery process: ‘The court may, for good cause, issue an order to protect
17 a party or person from annoyance, embarrassment, oppression, or undue burden or expense.’ *Id.* (citing
18 Fed. R. Civ. P. 26(c)).

19 The Ninth Circuit has clarified that the key in determining which standard to apply in assessing
20 a motion for leave to file a document under seal is whether the documents proposed for sealing
21 accompany a motion that is “more than tangentially related to the merits of a case.” *Center for Auto
22 Safety*, 809 F.3d at 1101 (9th Cir. 2016). If that is the case, the compelling reasons standard is applied.

III. DISCUSSION

24 Here, the exhibits Defendants seek to file under seal are filed in connection with Defendants'
25 renewed motion for summary judgment, which is undoubtedly "more than tangentially related to the
26 merits" of this case. Therefore, the "compelling reasons" standard applies.

1 Insofar as Exhibits H, I, J, K, and L are concerned, Defendants only discuss the “confidentiality”
2 of the documents and potential safety and security concerns in generalities. They do not point out what
3 exactly is confidential about these particular documents, or what specific safety and security concerns
4 are implicated. The court tends to agree with Plaintiff that he, Gadsden and Peterson have put these
5 disciplinary hearings at issue and have described what occurred in those proceedings in this litigation;
6 therefore, the court does not perceive what would be accomplished at this time by sealing these particular
7 materials.

8 Defendants simply have not demonstrated how the substance of these hearing transcripts and
9 audio recordings—the filing of grievances concerning the pagan grounds—is “highly confidential,” such
10 that it should be shielded from public disclosure. From the complaint and other documents publicly filed
11 in this litigation, it is clear that the pagan and Native American inmates in the unit were told in January
12 2009 that the area they used for religious activities would be flattened somewhat because of construction
13 work occurring in the area, and a group of pagan inmates felt their grounds were disrespected and at least
14 fifteen inmates filed over twenty-one grievances (each) on various issues. The prison staff determined
15 that the grievances were designed to harass, and the inmates were charged with abuse of the grievance
16 process. The inmates maintained they were simply trying to exhaust their administrative remedies in
17 accordance with prison regulations, and that they were not notified they were doing something wrong
18 (i.e., they did not receive an improper grievance memorandum). DeBarr, Gadsden and Peterson were
19 found guilty of the disciplinary charges and each was sentenced to fifteen days of disciplinary
20 segregation. These same basic facts are divulged in the hearing transcripts of DeBarr, Gadsden and
21 Peterson.

22 The court does not see any reason to seal the disciplinary proceeding transcripts or audio
23 recordings for DeBarr, Gadsden, and Peterson, which essentially mimic the allegations of their
24 complaints, and are already in the public record. Nor do the transcripts or recordings reveal anything
25 about the prison disciplinary process that poses any apparent safety or security concern.

26 It is true that the court has permitted the filing of disciplinary hearing transcripts and recordings
27 under seal in the past, but the burden is on the party seeking to seal a document to overcome the
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1 presumption of public access in each instance. An order in one case is not carte blanche approval for the
2 filing of a disciplinary hearing transcript under seal in another case. Moreover, the cases cited by
3 Defendants' reply (*Depasquale*, 3:07-cv-00107-LRH-VPC, 2009 WL 2957967 (D. Nev. Sept. 10, 2009);
4 *Alexander*, 3:12-cv-00535-MMD-VPC; *Alexander*, 3:12-cv-00535-MMD-VPC, 2014 WL 11370483),
5 are all decisions by Magistrate Judge Cooke, who is free to make whatever determination she sees fit
6 in her cases under the guidance of Ninth Circuit case law on point.

7 Therefore, the motion for leave to file Exhibits H, I, J, K and L under seal is denied.

8 Insofar as Exhibit N (the Widmar deposition transcript) is concerned, the portion of the transcript
9 submitted for filing under seal was marked by the court reporter as confidential, and the parties were
10 cleared from the room during the testimony. The parties' attorneys found the testimony to be sensitive
11 enough to exclude the parties from that portion of the deposition, and the court appreciates the safety
12 and security concerns that are implicated by Widmar's testimony concerning why some inmates who
13 were initially involved in submitting the grievances did not also serve a disciplinary sanction. Therefore,
14 the court finds compelling reasons exist for sealing the exhibit and the motion is granted with respect
15 to Exhibit N.

16 **IV. CONCLUSION**

17 Defendants' motion (ECF No. 108) is **DENIED** with respect to Exhibits H, I, J, K and L. The
18 Clerk shall **UNSEAL** those exhibits.

19 Defendants' motion is **GRANTED** with respect to Exhibit N, which shall remain under seal.

20 **IT IS SO ORDERED.**

21 DATED: January 30, 2017.

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24 WILLIAM G. COBB
25 UNITED STATES MAGISTRATE JUDGE
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